No. 06-646

IN THE

Supreme Court of the United States

THOMAS J. TIMONEY, ESQUIRE,
As Receiver for the Hankin Family Partnership,

Petitioners,

v.

REALEN VALLEY FORGE GREENES ASSOCIATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether Petitioner has presented any compelling reason to depart from this Court's settled precedent that an order denying a motion to disqualify counsel in a civil case is not appealable under 28 U.S.C. § 1291 or the collateral order doctrine.

Whether Petitioner has presented any compelling reason to depart from this Court's settled precedent that interlocutory injunctive orders must relate to the merits of an action to be immediately appealable under 28 U.S.C. § 1292(a)(1).

Whether there is any compelling reason to view the order in question as an appealable exercise of abstention when the District Court has already reopened proceedings on the merits and is considering a motion to dismiss the entire action with prejudice over Petitioner's objections.

Whether Petitioner has presented any compelling reason to review the finding of the Court of Appeals that his petition for mandamus is moot or its holding that the petition lacks merit.

LIST OF PARTIES

The only proper Petitioner is Thomas J. Timoney in his capacity as the Receiver for the Hankin Family Partnership (the "Receiver"). The Hankin Family Partnership ("Hankin") was removed as a plaintiff in this action in the First Amended Complaint filed in 2001 and has never sought to be reinstated or requested leave to intervene. Hankin simply appeared on the motion to discharge or disqualify counsel.

Respondent Realen Valley Forge Greenes Associates ("Realen") is a Pennsylvania General partnership and its partners are Northwestern Mutual Life Insurance Company and Realen Golf Communities, L.P.

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INTRODUCTION

Petitioner has presented no "compelling reason" why his Petition for a Writ of *Certiorari* (the "Petition") should be granted. While offering a multitude of theoretical complaints about the Third Circuit's dismissal of his appeal and petition for mandamus from an order denying a motion to discharge or disqualify counsel, he has flatly failed to demonstrate that the ruling is in conflict with any decision of this Court or another Court of Appeals, or that an important federal question that has not been settled by this Court is implicated.

Over twenty years ago, this Court issued a series of decisions holding that orders relating to disqualification of counsel are not immediately appealable under 28 U.S.C. § 1291 or the collateral order doctrine. Petitioner has offered no compelling reason to depart from that precedent, which has been universally followed in civil cases by all of the Circuit Courts.

Nor has Petitioner offered any compelling reason to question the Third Circuit's rejection of his attempts to characterize, and thereby transform, an order denying a disqualification motion into a mandatory injunction or an exercise of abstention. Even if that transformation could magically occur, the so-called "mandatory injunction" is not appealable under 28 U.S.C. § 1292(a)(1) because it does not relate to the merits of this civil rights action. Nor has there been an immediately appealable exercise of abstention because the District Court denied the disqualification motion without prejudice to renewal after Petitioner obtained a non-binding interpretation of his contract with Realen relating to joint representation in and prosecution of this action from the state court. Again, no other Circuit Court has issued a decision which conflicts with the one here by the Third Circuit.

Furthermore, if there was an exercise of abstention, it is now over. Before the Petition was filed, the District Court directed Realen to file a motion to dismiss this action with prejudice and Realen has so moved on the grounds of a fully executed settlement agreement with the defendants which fulfills all of the conditions to Realen's right to settle this action without the consent of Petitioner under his contract with Realen. The Petitioner has opposed the motion on various grounds through separate counsel and the District Court is presently considering it. Thus, any delay in a federal adjudication has ended.

Petitioner merely mentions, without discussion, the finding of the Court of Appeals that his petition for mandamus is moot, offering no reason whatsoever to question or review that finding. Petitioner simply repeats a few of the arguments raised in the petition for mandamus below, which the Court of Appeals also found to lack merit, offering no justification for issuance of a writ of *certiorari*.

COUNTER-STATEMENT OF THE CASE[1]

A. Factual Background

The relationship between Realen and Thomas J. Timoney in his role as Receiver for the Hankin Family Partnership ("Hankin") began in 1996 and is governed by a series of agreements that have been adopted as orders by the Court of Common Pleas of Montgomery County, Pennsylvania (the "State Court"). In particular, their relationship in this litigation is governed by the terms of an Amended and

[1] While cognizant of their duty to address misstatements of law or fact, counsel for Realen believe that there are so many in the Petition that a complete restatement of the case best serves that function.

Restated Agreement Concerning Representation and Joint Prosecution dated May 8, 2003 (the "AJPA"). This case was instituted under the first version of that contract.

The series of contracts began in 1996, when Realen entered into a Purchase Agreement with Timoney to buy the last remaining asset of Hankin, the Valley Forge Golf Course (the "Property") located in Upper Merion Township, Pennsylvania (the "Township"). Due to the Township's long-standing resistance to development, Realen's obligation to purchase the Property was contingent upon a change in zoning to allow commercial development and receiving final approvals to commence building. While required to close on the Property once it had obtained final development approvals, Realen has always had the right to close before those contingencies occurred.

Realen filed a challenge to the agricultural zoning of the Property in 1997, which the Township's Zoning Hearing Board ("ZHB") eventually denied in 1999. Realen appealed the adverse ZHB decision to the State Court, which affirmed the ZHB on December 1, 2000. After discussion of the potential for Realen to bring and pay for the prosecution of other actions against the Township, Realen and Timoney agreed that Realen would pay for its lawyers to bring two separate lawsuits against the Township, which are referred to as the "Additional Actions" – an inverse condemnation action in the State Court and this federal civil rights action in which Timoney and Realen brought § 1983 claims for damages and requested a declaration that the zoning of the Property was unconstitutional.

The primary interest of the parties in instituting the Additional Actions is expressly stated in the AJPA and its predecessor as obtaining "a court order permitting the

development of the Property as a Retail/Hotel/Apartment Facility or as a Retail/Hotel/Office Facility, or in causing the Supervisors to settle the Zoning Appeal and the Additional Actions by permitting Realen to develop the Property. . .". It was, however, recognized that Timoney's primary interest could change to obtaining a monetary award, which had the potential to be at odds with Realen's interest in development of the Property. The AJPA expressly recognized that if this potential conflict arose, Realen would have sole discretion to settle the Additional Actions without any monetary payment by the Township if the settlement between Realen and the Township would permit development of the Property.

The AJPA provides that in the event that the conflict arises, Realen has the right in its sole discretion to settle the Additional Actions without Timoney's consent:

> Because of the foregoing potential conflict of interests, Kaplin required as a condition to instituting the Additional Actions on behalf of Hankin and Realen, and Realen required as a condition to agreeing to pay the cost of the Additional Actions that Timoney agree, on behalf of himself and Hankin, that if Realen determines, in its sole discretion, that it is desirable or prudent to settle either or both of the Additional Actions, Realen shall have the authority to cause Kaplin to settle either or both of the Additional Actions on behalf of Hankin and the consent of Hankin and/or Timoney shall not be required; but only if any such settlement shall entitle Realen to develop the Property for the Permitted Uses . . . . Realen shall not have the right to cause the settlement of the Additional Actions in a manner that would not permit the development of the Property for the Permitted Uses . . . . Any settlement negotiated

> by Realen shall include a release by the Township and the other defendants in the Additional Actions of all claims and actions which they have against Hankin and/or Timoney.

Timoney's primary interest in the Additional Actions changed to an award of money damages as a result of the decision in the zoning litigation, *In re Appeal of Realen Valley Forge Greenes Assoc.*, 576 Pa. 115, 838 A.2d 718 (2003) invalidating the zoning of the Property and allowing Realen to proceed with commercial development, and Realen's decision to exercise its right to close on the Property before obtaining final development approvals. Once the Pennsylvania Supreme Court granted Realen zoning relief and Realen paid over $27,000,000 to purchase the Property, Timoney's sole interest in prosecuting this case became a potential monetary award because no other relief could be obtained.

After closing on the Property, Realen continued prosecution of the Additional Actions and, for example, filed a motion for summary judgment on the equal protection claim. *See Timoney v. Upper Merion Twp.*, 2004 WL 2823227 (E.D.Pa. 2004). Realen was simultaneously pursuing settlement discussions with the Township, which approached Realen in January of 2004 with the concept that Realen could proceed with a different plan of development if the Additional Actions seeking damages could be dismissed.

By the fall of 2004, the settlement discussions with the Township had reached a point where Realen believed that it would be appropriate to slow down the damages litigation and ultimately stay the Additional Actions.[2] Realen and the

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[2] Although Timoney characterizes Realen's request by e-mail that joint counsel "put the brakes on" the litigation as a nefarious

(Cont'd)

Township requested the District Court in this case and the State Court in the inverse condemnation action to enter orders staying all proceedings pending settlement negotiations between the Township and Realen, which could result in a global settlement of all litigation. The District Court entered the requested stay order on December 19, 2004.

When Timoney was advised that the Additional Actions were going to be stayed, he objected because the stays had the potential to impact a claim for payment from Realen of additional money under the agreement for purchase of the Property. In response, Realen informed Timoney that it had the ability under the AJPA to stay the Additional Actions in pursuit of its right to reach a global settlement without his consent that would result in development of the Property. Timoney petitioned the State Court to lift the stays of the Additional Actions under the disputes resolution provisions of the AJPA.[3] In response, Realen, through Kaplin Stewart, instituted a declaratory judgment action against Timoney and Hankin seeking a determination that it does not have to pay any additional funds under the contract for purchase of the Property (the "Declaratory Judgment Action"), which is now pending in the State Court.

(Cont'd)
plot, he does so out of context and fails to inform the Court that Realen requested that the pace of the litigation be slowed due to a concern that the litigation was "moving too quickly and might produce a result (either positive or negative) which would impair our ability to settle the zoning issues with the Township." Realen's goal has always remained consistent with the stated objective of the AJPA to use the Additional Actions as a means to permit development of the Property.

[3] The AJPA contemplates that if Timoney disagrees with any "significant action" joint counsel intends to take, he will submit that dispute to the State Court.

B. Proceedings Below And Developments During Pendency

The merits of this case involve the assertion of civil rights violations under 42 U.S.C. § 1983 by Timoney and Realen against the Township arising out of its refusal to change the zoning of the Property to allow commercial development. The litigation was stayed pending settlement negotiations between the Realen and the Township for nearly a year until Timoney retained his own separate counsel and filed the motion giving rise to the Petition.

In November 2005, through their separate counsel, Timoney and Hankin filed a motion to disqualify Kaplin Stewart in the Declaratory Judgment Action (the "State Court Motion"). The State Court Motion requested that Kaplin Stewart be disqualified from representing Realen by asserting that, *inter alia*: (a) the representation was in violation of Pennsylvania Rule of Professional Conduct ("Pa.R.P.C.") 1.7 or 1.9 or common law because of the concurrent representation of Timoney as joint counsel; (b) Kaplin Stewart had "failed to obey and refused [Timoney's] requests that they withdraw as counsel for Timoney in the state and federal litigations"; and (c) Timoney had terminated Kaplin Stewart and its refusal to withdraw from this action was "a continuing conflict of interest".

Separate counsel chosen by Timoney then filed his motion to terminate or disqualify Kaplin Stewart as joint counsel in the District Court (the "Federal Court Motion"), asserting the same arguments for disqualification on alleged violation of Pa.R.P.C. 1.7 or 1.9 or common law raised in the State Court Motion. In addition, Timoney argued that he had the absolute right to terminate joint counsel under Pa.R.P.C. 1.16. Realen responded to the Federal Court Motion by, *inter alia,* pointing out that disqualification of

joint counsel was being sought in order to abrogate Realen's right under the AJPA to direct joint counsel to settle this case without Timoney's consent. On January 17, 2006, the District Court held an off the record conference with counsel at which, *inter alia,* separate counsel for Timoney disclosed that the objective of the motion was to remove joint counsel so that Timoney could proceed with the litigation on the merits, thereby foiling Realen's efforts to settle with the Township.

Thereafter, the State Court orally advised counsel that the State Court Motion was denied as to disqualification of Kaplin Stewart, but granted under Pa.R.P.C. 3.7 as to disqualification of two attorneys in the firm who were potential witnesses. The next day, the District Court held a hearing on the Federal Court Motion, at which the motion was orally denied without prejudice and Timoney was then ordered to request the State Court "to interpret the [AJPA] insofar as it relates to any right of the Receiver to prosecute this action separately". Petition at 5a.

The District Court found that the AJPA "is not really an attorney-client agreement, it's an agreement between two parties, it's a business deal, pure and simple." Petition at 38a. The District Court further found that the disputes raised by the motion to disqualify and terminate Kaplin Stewart were to be presented to the State Court under the disputes resolution clause of the contract; that under that clause, the Receiver was obligated to participate in or initiate declaratory judgment actions in the State Court to resolve such disputes; that the State Court was already presented with some of those disputes in the form of a very similar motion to disqualify pending before it; and that comity required the District Court to refrain from substituting its judgment on interpretation of the contract, which the State Court had approved and entered as its order. Petition at 36a-39a.

When the State Court entered its initial order on the State Court Motion, it specifically found that Timoney had waived and consented to the claimed conflict and further found that:

> In deciding not to disqualify the law firm of Kaplin Stewart, this Court finds that the law firm of Kaplin Stewart, Marc Kaplin, Esq. and Kevan Hirsch, Esq. represented only the Plaintiff in the negotiation and drafting of the Amended Purchase Agreement and the Joint Representation and Prosecution of Litigation Agreement. This Court declines to find that this law firm and these counsel violated any rules of professional conduct regarding concurrent conflicts of interest by filing the Complaint in Declaratory Judgment that is the subject of the present pending matter.

The District Court thereafter entered its Order of March 13, 2006, which included an invitation to seek certification under 28 U.S.C. § 1292(b). Timoney declined the invitation to move for certification and initiated two separate proceedings in the Court of Appeals: (1) he filed a Notice of Appeal citing § 1291, § 1292(a)(1) and the collateral order doctrine (the "Appeal"); and (2) he concurrently filed a Petition for Writ of Mandamus (the "Mandamus Petition"). When Timoney moved to consolidate those proceedings, Realen opposed the motion and cross-moved to dismiss the Appeal for lack of appellate jurisdiction, citing *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985) and *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981).

Realen also presented the Court of Appeals with a motion to dismiss the Mandamus Petition as moot or barred by collateral estoppel. Realen brought that motion for three reasons based on proceedings in the State Court that occurred after filing of the Mandamus Petition, which served to render it moot. First, immediately after filing the Mandamus

Petition, Timoney began presenting the State Court with every factual and legal argument raised in the District Court to justify termination and disqualification of Kaplin Stewart as his counsel in this action and thereby effectively complied with the District Court's order to seek an interpretation of the AJPA. Second, the State Court declined to accept Timoney's original arguments, but nevertheless issued a decision disqualifying Kaplin Stewart, apparently based on the State Court's interpretation that a non-consentable conflict was present. Third, Realen elected not to seek reconsideration of the State Court disqualification,[4] but proceeded to obtain new counsel in the Declaratory Judgment Action so that the concurrent conflict on which Timoney's Mandamus Petition relied so heavily no longer existed.

On the first business day after filing the Mandamus Petition complaining that the District Court had improperly referred termination of joint counsel to the State Court, Timoney began to comply with the District Court's order by affirmatively presenting the State Court with the question whether he had the absolute right to terminate joint counsel in this action. On March 20, 2006, separate counsel for Timoney presented the State Court with a letter requesting a hearing on informed waiver due to "compelling circumstances", including the fact that Kaplin Stewart had "impermissibly and unethically refuse[d] to withdraw its appearances for [Timoney] and Hankin in the Additional Actions after having been discharged" and that "[t]here was no informed waiver that Kaplin [Stewart] would refuse to withdraw as [Timoney's] counsel after being expressly terminated".

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[4] Realen was precluded under Pennsylvania law from taking an interlocutory appeal of the State Court order because disqualification determinations are not considered to be appealable collateral orders. *See, Vaccone v. Syken*, 889 A.2d 1103, 1107 (Pa. 2006).

The State Court then entered an order setting an evidentiary hearing and oral argument ". . . for further consideration and possible modification of the Court's Order of March 7, 2006." At the State Court hearing on April 7, 2006, Timoney did exactly what the District Court's order directed by presenting evidence and oral argument on disqualification and whether Timoney had the absolute right to terminate Kaplin Stewart as counsel in this action under Pa.R.P.C. 1.16. The State Court rejected that argument stating that: ". . . you have an agreement here that talks about representation. I read that carefully yesterday. I['ve] got to tell you, I don't think Mr. Timoney can discharge Kaplin."

After hearing Timoney's evidence, the State Court Judge also said that "I still think that there was an informed waiver of this, but I am very concerned about [Rule of Professional Conduct 1.7(b)(3)]" and whether that rule prohibited such a waiver as a "non-consentable conflict". The State Court then issued an order for counsel to submit ". . . memoranda on the limited issue whether Pennsylvania Rule of Professional Conduct 1.7(b) prohibits a waiver of the conflict of interest in matters such as the one at bar."

The memorandum submitted to the State Court by Timoney argued that Pa.R.P.C. 1.7(b)(3) should be interpreted to make the conflict non-consentable, urged the State Court to change the findings in its March 7, 2006 Order on consent by Timoney and ethical conduct by Kaplin Stewart, and for the third time, presented the State Court with the argument that Timoney had the absolute right to terminate joint counsel in this case despite the AJPA.

On April 28, 2006, in keeping with its concerns that a non-consentable conflict existed, the State Court issued an order disqualifying the entire Kaplin Stewart firm for "the reasons set forth in Pa.R.P.C. 1.7." The State Court did

not, however, modify or vacate any of the findings on waiver, consent and ethical conduct by Kaplin Stewart in its previous order.

In moving to dismiss the Mandamus Petition, Realen pointed out that while Timoney complained that the District Court failed to exercise its jurisdiction by directing him to State Court, Timoney had rendered the proceedings moot by essentially following the District Court's directive in presenting evidence and argument on the question of termination to the State Court judge responsible for resolving disputes under the AJPA.[5] Realen further pointed out to the Court of Appeals that as a result of the State Court's order disqualifying the Kaplin Stewart firm, Realen was obtaining new counsel in the Declaratory Judgment Action so that the concurrent conflict on which the Federal Court Motion was based, the representation adverse to Timoney in the State Court, no longer existed.

During the pendency of proceedings in the Court of Appeals, Realen and the Township completed their negotiations and executed a final, comprehensive Settlement Agreement. Insofar as it is relevant here, the Settlement Agreement contemplates that Realen will obtain a dismissal with prejudice of this case and the State Court inverse condemnation action, in exchange for which, the Township

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[5] An issue is moot "when it no longer presents a 'live controversy'." *Hudson v. Robinson*, 678 F.2d 462, 465 (3d Cir. 1981). The question whether Timoney must comply with the District Court's alleged "mandatory injunction" directing him to proceed in State Court is no longer a live controversy as Timoney has complied with the "injunction" and the State Court has rejected his contentions. "Where activities sought to be enjoined have already occurred, and the appellate courts cannot undo what has already been done, the action is moot." *Friends of the Earth, Inc. v. Bergland*, 576 F.2d 1377, 1379 (9th Cir. 1978); *accord McKee & Co. v. First Nat'l Bank of San Diego*, 397 F.2d 248 (9th Cir. 1968) (per curiam).

will permit development of additional density on the Property. Having been advised of the Settlement Agreement, the District Court has directed Realen to file a motion to dismiss this case with prejudice so as to allow the Receiver an opportunity to be heard in opposition to dismissal. That motion has been filed, fully briefed by all parties and is presently awaiting disposition by the District Court.

REASONS FOR DENYING THE PETITION

The Third Circuit's Dismissal of the Appeal for Want of Appellate Jurisdiction is in Harmony with This Court's Decisions and All Other Circuits

Timoney argues that *certiorari* should be granted to review the Third Circuit's dismissal of his Appeal from denial of a motion to disqualify his own counsel for want of appellate jurisdiction, but makes no attempt to establish that the Third Circuit's decision is in conflict with any decision of this Court or another Circuit Court or that an unresolved federal question is involved. Instead, he attempts to distinguish settled and uniformly followed precedent of this Court, claims that the Third Circuit "ignored" one of its own allegedly conflicting decisions and freely admits that his disqualification motion involved an issue of Pennsylvania policy and law.

Over twenty years ago, this Court settled the issue of appellate jurisdiction now raised by Timoney. *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985) and *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981) hold that a district court's grant or denial of a motion to disqualify counsel in a civil case is not appealable under 28 U.S.C. § 1291 or the collateral order doctrine. *Flanagan v. U.S.*, 465 U.S. 259 (1984) similarly held that pretrial orders disqualifying defense counsel in criminal cases are not

subject to immediate appeal. While foreclosing an appeal, those decisions indicate that interlocutory appellate review of such an order may be available through certification for immediate appeal pursuant to 28 U.S.C. § 1292(b) or a writ of mandamus. *Firestone,* 449 U.S. at 378, fn. 13 (1981) ("if . . . it will be harmed irreparably, a party may seek to have the question certified for interlocutory review and, in the exceptional circumstances for which it was designed, a writ of mandamus from the court of appeals may be available"). Here, Timoney declined the District Court's invitation to file a motion for § 1292(b) certification, electing instead to pursue both the Appeal and the Mandamus Petition in the Court of Appeals.

In the Petition, Timoney disingenuously claims that the Third Circuit relied "exclusively" on *Richardson-Merrell,* asserting that case does not apply because it involved disqualification of an opposing party's counsel whereas his motion to disqualify his own counsel was denied, allegedly depriving him of the right under Pennsylvania law to terminate joint counsel and choose another.[6] He does not even mention *Firestone*, which explicitly held that "orders denying motions to disqualify are not appealable final decisions under § 1291" or the collateral order doctrine. 449 U.S. at 370, 375. Nor does he acknowledge that *Richardson-Merrell* decided the question left open in *Firestone* of whether granting disqualification of a party's counsel should be immediately appealable. Thus, the Third Circuit's citation of *Richardson-Merrell* is appropriate because the case goes hand-in-hand with *Firestone* and it involves, as all orders disqualifying a party's counsel do, a situation where a party

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[6] It should be noted at present that while Kaplin Stewart remains as counsel of record for Timoney, he is also concurrently represented in this case by separate counsel of his choice, who has been and remains free to present any position or argument believed to benefit Timoney's interests.

is deprived of the right of representation by counsel of its choice. The District Court's Order is simply not appealable prior to a final decision on the merits and Timoney has given this Court no reason, let alone any compelling one, to consider overruling over two decades of precedent.

While Timoney attempts to distinguish *Richardson-Merrell* on various grounds, including the fact that he seeks to discharge his own counsel, he cannot escape the fact that he appealed denial of a motion for disqualification of counsel in a civil case. No Circuit Court case he cites questions the holdings of *Firestone, Richardson-Merrell* and *Flanagan*. Rather, a whole body of Circuit Court case law has developed from the suggestion in *Firestone* that immediate review by § 1292(b) certification or writ of mandamus may be appropriate. In fact, the one Circuit Court case cited by Timoney which does involve a party's attempt to disqualify its own counsel was decided on a petition for mandamus after the district court denied § 1292(b) certification. *In re Dresser Industries, Inc.*, 972 F.2d 540, 542 (5th Cir. 1992). Appeals in other similar cases have met the same fate as Timoney's did in the Third Circuit. *See, e.g., Arney v. Finney*, 967 F.2d 418 (10th Cir. 1992) (no jurisdiction to consider appeal of denial of motion to "terminate" counsel representing class of which movant was a member).

Timoney also claims that the Third Circuit's dismissal of his Appeal is contrary to one of its criminal cases treating a disqualification as a collateral order. The underpinning of this Court's cases that disqualification decisions are not within the collateral order doctrine is the fact that those orders will be reviewable after an adverse final judgment on the merits. The one exception to that basic premise is where the United States Attorney or its local office is disqualified in a criminal matter, for the government may be prohibited from appealing the disqualification by the Double Jeopardy clause

or the context of the criminal proceeding. As a result, in *U.S. v. Whittaker*, 268 F.3d 185 (3d Cir. 2001), the Third Circuit held that an order disqualifying the United States Attorney's office from participating in grand jury proceedings is appealable under the collateral order doctrine because the decision would otherwise be unreviewable. In *Whittaker*, the Third Circuit noted that *Flanagan* left open the question whether disqualification of the United States Attorney was immediately appealable as an otherwise unreviewable decision, noting that *Flanagan* in the criminal context and *Richardson-Merrell* in the civil arena both involved situations where disqualification could be challenged after final judgment. 268 F.3d at 192-93.

Accordingly, the Third Circuit did not, as Timoney contends, "ignore" *Whitaker*; the case simply has no application to a civil matter where Timoney can eventually obtain appellate review. Given that the District Court is currently considering dismissal of this entire case with prejudice over Timoney's objections, his opportunity for review after a final judgment may be fast approaching.

Throughout the Petition, Timoney attempts to characterize himself as a victim of rogue counsel being forever deprived of the allegedly "undisputed" fundamental right under Pennsylvania law to discharge counsel.[7] Even if that were so, he will eventually have the opportunity to attempt to vindicate his rights before an appellate court. As this Court said in *Firestone*:

> An order refusing to disqualify counsel plainly falls within the large class of orders that are indeed

[7] Both Timoney's characterization of himself as victim and his claim of an "undisputed" right to terminate counsel have been rejected by the trial courts before whom he has appeared. The District Court found that the joint representation agreement was a "business deal" between Timoney and Realen and the State Court has indicated that Timoney cannot unilaterally terminate counsel under that contract.

> reviewable on appeal after final judgment, and not within the much smaller class of those that are not. The propriety of the district court's denial of a disqualification motion will often be difficult to assess until its impact on the underlying litigation may be evaluated, which is normally only after final judgment. The decision whether to disqualify an attorney ordinarily turns on the particular factual situation of the case then at hand, and the order embodying such a decision will rarely, if ever, represent a final rejection of a claim of fundamental right that cannot effectively be reviewed following judgment on the merits.

449 U.S. at 377. Thus, Timoney's opportunity for appellate review will come, but he has offered no compelling reason for this Court to consider whether it should come now.

The Third Circuit's Rejection of Timoney's Argument That an Appealable Injunction was Imposed is Entirely Consistent with This Court's Decisions

In his argument that the Third Circuit should have treated the District Court's directive to obtain an interpretation of the AJPA from the State Court as a mandatory injunction appealable under 28 U.S.C. § 1292(a)(1), Timoney makes no attempt to show that the decision below is contrary to one by this Court or another Circuit Court or to identify an unresolved federal question. Indeed, he cannot do so because the Third Circuit's dismissal of the Appeal under § 1292(a)(1) is in perfect harmony with decisions of this Court and other Circuits.

Timoney's attempt to characterize the District Court order as a mandatory injunction appealable under 28 U.S.C. § 1292(a)(1) is totally undermined by his assertion that he

was "require[ed] to file his Motion to Discharge and Disqualify his own counsel in this federal action in the State Court." Petition at 14. That motion and the directive to seek a State Court interpretation are wholly unrelated to the merits of the 42 U.S.C. § 1983 claims against the Township and this Court's decisions assume that a disqualification decision in general "resolves an important issue completely separate from the merits". *Richardson-Merrell*, 472 U.S. at 431. By asserting that an order wholly unrelated to the civil rights claims in this case is appealable under § 1292(a)(1), Timoney has again raised an issue settled long ago by this Court.

"Orders that in no way touch upon the merits of the claim but only relate to pretrial procedures are not . . . 'interlocutory' [injunctions] within the meaning of § 1292(a)(1)." *Switzerland Cheese Ass'n, Inc. v. E. Horne's Mkt., Inc.*, 385 U.S. 23, 25 (1966); *accord*: *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 279 (1988). Even before those cases were handed down, it was recognized that the types of injunctions appealable under § 1292(a)(1) do not include "restraints or directions in orders concerning the conduct of the parties or their counsel, unrelated to the substantive issues in the action, while awaiting trial." *International Products Corp. v. Koons*, 325 F.2d 403, 406 (2d Cir. 1963). The direction in the order that Timoney characterizes as a mandatory injunction relates solely to pretrial issues regarding joint representation and the contracts between Realen and Timoney.

In his injunction argument, Timoney fails to cite any case decided by this Court or a Circuit Court which is contrary to the Third Circuit's disposition and no attempt is made to identify an unresolved federal question. Moreover, Timoney rendered the issue moot as more fully discussed below.

The Third Circuit's Refusal to Accept Timoney's Argument That an Appealable Abstention-Based Stay Was Entered is in Accord With Decisions of This Court

Timoney also complains that the Third Circuit should have treated the District Court's directive to seek an interpretation of the AJPA by the State Court as an abstention order, but cannot identify just which abstention doctrine was supposedly applied, finally speculating that *Colorado River* abstention must have been employed because Realen raised that case before the District Court. Petition at 16. Contrary to the cursory contention in the Petition (at 17), not all abstention-based stay orders are immediately appealable. To qualify for interlocutory appeal, they must either meet the finality test of 28 U.S.C. § 1291 by putting the litigants "effectively out of court" or qualify under the collateral order doctrine. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 11 (1983).

As this Court has explained:

> . . . we also held that the stay order at issue in *Moses H. Cone* was appealable under the collateral order doctrine. We determined that a stay order based on the *Colorado River* doctrine presents an important issue separate from the merits because it amounts to a refusal to adjudicate the case in federal court; that such orders could not be reviewed on appeal from a final judgment in the federal action because the district court would be bound, as a matter of *res judicata,* to honor the state court's judgment; and that unlike other stay orders, which might readily be reconsidered by the district court, abstention-based stay orders of this ilk are conclusive because

> they are the practical equivalent of an order dismissing the case.

Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 713 (1996) (citations omitted). Timoney was certainly not put out of court or deprived of a federal adjudication on disqualification that cannot be reviewed on appeal from final judgment because the District Court denied his motion without prejudice.

As a matter of comity, the District Court further:

> ordered that this action is stayed pending application by the Receiver to the [State Court] to interpret the [AJPA] insofar as it relates to any right of the Receiver to prosecute this action separately where Realen seeks, with Township consent, a global resolution of all litigation in state and federal courts.

This stay is distinguishable from other appealable abstention orders as the court both denied Timoney's motion without prejudice and stayed the case pending Timoney's application to the State Court. Where a district court stays proceedings, the order is not appealable when it "simply defers or postpones resolution of an action in federal court [and is] only a temporary measure not subject to appeal under 28 U.S.C. § 1291." *Spring City Corp. v. Am. Bldgs. Co.*, 193 F.3d 165, 171 (3d Cir. 1999). The decision would be appealable only if the district court "surrendered its jurisdiction to a state court and a decision in state court would have preclusive effect on the federal action." *Id.*

Moreover, this Court has upheld decisions similar to that of the District Court. In *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 30-31 (1959), the Court stated that in directing federal litigants to state court, "[t]he District

Court was thus exercising a fair and well-considered jurisdictional discretion in staying proceedings pending the institution of a declaratory judgment action and subsequent decision by the Supreme Court of Louisiana." *See also, Quackenbush*, 517 U.S. at 719-720 (collecting cases postponing federal decisions pending state court decision). If the District Court did abstain from deciding Timoney's motion, it did so as a temporary measure under *Thibodaux*.[8] Such temporary stays are not appealable. *Nemours Foundation v. Manganaro Corp., New England*, 878 F.2d 98 (3d Cir. 1989) (dismissing appeal from order certifying questions to Delaware Supreme Court because it did not terminate federal litigation, which would continue following certification); *In re Kozeny*, 236 F.3d 615 (10th Cir. 2000) (abstention-based stay orders that merely delay federal proceedings are not subject to immediate appeal, even where state court could conclusively determine some of issues in federal case); *Boushel v. Toro Corp.*, 985 F.2d 406 (8th Cir. 1993) (same).

Thus, while Timoney finally points to a federal question, it is one that has been decided by this Court and the Third Circuit's treatment of his abstention argument is not in conflict with those decisions or any other Circuit Court case.

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[8] Any delay in federal adjudication from an abstention is now over because the District Court has apparently concluded, as the Court of Appeals did, that Timoney effectively complied with the directive to seek an interpretation of the AJPA from the State Court. While the District Court initially indicated that a post-appeal conference would be held on status of compliance with its March 13, 2006 Order, it has dispensed with that inquiry and reopened the case by directing Realen to move for dismissal with prejudice. It is no longer necessary for Timoney to apply to the State Court for an interpretation of the AJPA.

Petitioner Offers No Reason Whatsoever to Grant *Certiorari* to Review the Third Circuit's Finding that His Mandamus Petition is Moot

Noticeably absent from the Petition is any argument that there is some compelling reason to grant it with respect to the Third Circuit's disposition of the Mandamus Petition. Indeed, Timoney merely mentions that the Mandamus Petition was dismissed "as moot and/or lacking merit." Petition at 8. Timoney then pretends to be puzzled by this pronouncement, stating that ". . . the Panel did not provide any explanation or citation for denial of the Petition for Writ of Mandamus." *Id.*

In a total lack of candor, counsel for Timoney has failed to disclose in the Petition that Realen filed a comprehensive motion to dismiss the Mandamus Petition as moot that was vigorously opposed. Timoney fails to mention even one of the numerous orders, hearings, and briefs upon which that motion was based by Realen and granted by the Third Circuit. Indeed, even the most liberal reading of the Petition would lead one to conclude that the Third Circuit dismissed the Mandamus Petition *sua sponte* based on events as they stood on the day it was filed.

But the day after the Mandamus Petition was filed, counsel for Timoney began a relentless campaign to have the State Court reverse its ruling that Kaplin Stewart's representation of Realen in the Declaratory Judgment Action was appropriate. During that campaign, Timoney and his counsel effectively complied with the District Court's directive to apply to the State Court for an interpretation of the AJPA by arguing to the State Court that Timoney had the absolute right to terminate joint counsel and separately prosecute this federal case through his own counsel despite the terms of the AJPA.

Perhaps the result in the State Court, which found that no ethical violations had occurred and indicated that the AJPA prevented unilateral termination of joint counsel by Timoney, explains why the Petition does not challenge the dismissal based on mootness. It is facetious to contend, as Timoney did in opposition to Realen's motion to dismiss the Mandamus Petition, that the State Court did not have before it the arguments which Timoney's own counsel made to the State Court in a letter brief, during an evidentiary hearing, and in a post-hearing memorandum.

The Petition does not even assign error to the Third Circuit's finding that the Mandamus Petition is moot. In the alternative to his appellate jurisdiction arguments and almost as an afterthought, Timoney simply contends that the highly discretionary writ of mandamus "is required". Petition at 17. There is no reason for this Court to grant *certiorari* to review this mere contention, which is all that remains after the actions of his counsel before the State Court rendered the request for mandamus moot.

Petitioner Offers No Reason Why This Court Should Review the Third Circuit's Determination That His Mandamus Petition Lacks Merit and Plainly, It Does

Rather than address the reasons why this Court should consider granting *certiorari* as to the Third Circuit's dismissal of his Mandamus Petition for lack of merit, Timoney simply repeats some of the arguments made below, as if they will gain merit through mere repetition. The Third Circuit's dismissal came after both Timoney's opening brief on the Mandamus Petition and Realen's brief in opposition were filed. A short summary of the arguments fully made in Realen's brief in opposition to the Mandamus Petition will suffice to show that it plainly lacks merit and demonstrate that this Court should not grant *certiorari* to reach the same conclusion.

This Court has established three prerequisites to the issuance of a writ of mandamus:

> First, "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires," – a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process. Second, the petitioner must satisfy "the burden of showing that [his] right to issuance of the writ is "clear and indisputable." Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.

Cheney v. U.S. Dist. Court for Dist. of Columbia, 542 U.S. 367, 380-381 (2004) (citations omitted).

Timoney simply cannot establish that his right to the extraordinary writ of mandamus is "clear and indisputable". While Timoney characterizes the issue as one involving a client's absolute right to terminate his own counsel, he dismisses the AJPA and his obligations to Realen under that contract by erroneously asserting that the AJPA is merely a fee agreement with joint counsel. Timoney ignores the fundamental nature of the AJPA, that is, a "business deal" approved as an order of the State Court, which gives Realen the unilateral right to settle this litigation. Timoney agreed to limit the scope of joint counsel's representation of him to prosecution of the Additional Actions, and the AJPA reflects Timoney's agreement with Realen that the Additional Actions were a means by which to develop the Property and that Realen, as the developer paying the fees and costs incurred to prosecute them, would have the ability to instruct joint counsel to settle the litigation in the event that a conflict of interest arose between Realen and Timoney. In the event of

that conflict, the AJPA provides that Realen shall have the ability to settle the litigation in exchange for the ability to develop the Property, which was the stated objective of the Additional Actions. Accordingly, Timoney's alleged right to terminate joint counsel with Realen is not clear and indisputable; it is contrary to the express provisions of the AJPA.

Similarly, Timoney cannot establish a clear and indisputable right to have joint counsel disqualified. He presented the disqualification motion to the District Court so that he might obstruct Realen's ability to settle the litigation pursuant to the terms of the AJPA and subsequently develop the Property. While the motion was based upon joint counsel's adversarial role against Timoney in the State Court, the State Court held that the concurrent conflict had been waived, expressly stated that no Pa. R.P.C. violations had occurred and indicated that Timoney could not unilaterally discharge joint counsel under the AJPA. The Mandamus Petition was nothing more than a veiled request that the Third Circuit review those State Court rulings in violation of the *Rooker-Feldman* doctrine. Both the State Court's resolution of the disqualification motion and the terms of the AJPA are fatal to Timoney's allegedly clear and indisputable right to mandamus.

In short, the Third Circuit's conclusion that the Mandamus Petition, if not moot, lacks merit, was correct. As that conclusion does not conflict with any decision of this Court or any Circuit and involves no unsettled issue of federal law, there is no reason for this Court to review it on a writ of *certiorari*.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

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